IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Leave to Appeal under Section 31DD of the Industrial Disputes Act, No. 43 of 1950 as amended by Act, No. 24 of 2022.

K. A. Munidasa
Wattahena, Thalagaswala.

Applicant

SC Appeal No. 143/15
SC/HC/LA 76/14
SP/HC/LT/AP/907/2012
LT/Galle No. 4/G/513/2009

-Vs.-

Diya-kithulkanda Co-operative Thrift & Credit Society Ltd,
Diya-kithulkanda, Thalgaswala.

Respondent

AND

Diya-kithulkanda Co-operative Thrift & Credit Society Ltd,
Diyakithulkanda, Thalgaswala.

Respondent-Appellant

-Vs.-

K. A. Munidasa,Wattahena, Thalagaswala.

Applicant-Respondent

AND NOW BETWEEN

Diya-kithulkanda Co-operative Thrift & Credit Society Ltd,
Diyakithulkanda, Thalgaswala

Respondent-Appellant-Petitioner

-Vs.-

K. A. Munidasa
Wattahena, Thalagaswala.

Applicant-Respondent-Respondent

BEFORE: Buwaneka Aluwihare, PC, J.
L.T.B. Dehideniya, J.
Yasantha Kodagoda, PC, J.

COUNSEL: Sanjaya Kodituwakku for the Respondent-Appellant-Petitioner
M. Wanniappa for the Applicant-Respondent-Respondent.

WRITTEN SUBMISSIONS: 28.02.2022

ARGUED ON: 30.08.2022

DECIDED ON: 10.01.2023

Judgement

Aluwihare PC. J.,

(1) The Applicant-Respondent-Respondent (hereinafter referred to as the (Applicant) filed an application against the Respondent-Appellant-Petitioner (hereinafter referred to as the Appellant) in the Labour Tribunal on the basis that his services were terminated wrongfully. The Applicant prayed for reinstatement and back-wages. The learned President of the Labour Tribunal upheld the application and ordered the reinstatement and payment of back-wages. Aggrieved by the said order, the Appellant appealed against the award to the High Court. The learned High Court Judge affirmed the award of the learned President of the Labour Tribunal and in addition ordered the payment of back-wages to cover the duration of the inquiry. The Appellant is now canvassing the said order of the High Court.

(2) When this matter was supported before this court for Special Leave to Appeal, Special Leave was granted on the following questions of law referred to in sub-paragraphs (b) (c) and (d) of paragraph 18 of the petition of the Appellant:

[I] Have both the President of the Labour Tribunal and the learned High Court Judge overlooked the nature of the employment of the Respondent?

[II] Have both the President of the Labour Tribunal and the learned High Court Judge misdirected themselves in ordering reinstatement of service of the Respondent?

[II] Have both the President of the Labour Tribunal and the learned High Court Judge erred in fact and law in computing the back wages of the Respondent?

(3) It would be apposite to refer to the facts of the case before examining the aforementioned questions of law. The Applicant had joined the Appellant, the Diya-Kithulkanda Co-operative Thrift & Credit society Ltd., as a "Cash Collector" on the 25th of August 2007 and continued in service till July 2009. The Applicant, however, asserts that he had not been paid his salary for the months of May, June, and July in 2009 and had alleged that when he made inquiries about the non- payment which was on the 31st July, the Appellant had stopped providing him with work. According to the Applicant, on the 3rd of August he had again made further inquiries and he was once again refused work. Thereafter, on 3rd September 2009 he had filed an application in the Labour Tribunal claiming relief in the form of reinstatement and back wages for wrongful termination. According to the Applicant he had been paid a monthly salary of Rs.10, 000/-. at the time of dismissal.

(4) The Appellant, in their response to the application filed by the Applicant, maintained that the Applicant, had been recruited on contract basis, initially, for a period of one year, beginning, 1st August 2007 to work in the delivery van as a "Cash Collector" for a Product Distribution Agreement the Appellant had entered into with Nestle Lanka PLC.in May 2007 [R6]. Initially this had been for a period of one year. At the expiry of the said contract period, however, the Applicant was offered an extended contract for the period of one more year beginning, 1st August 2008 and ending on 31st July 2009 [R16 A] for services related to the same project. At the expiry of that contract, the Appellant had decided to extend the contract as a Cash Collector for a further period of 3 months with effect from 1st August 2009. It is in evidence that the reason for obtaining services on a contract basis instead of permanent employment was due to the fact that the services were needed only for the duration of the subsistence of the 'distribution agency' with Nestle Ltd.

(5) It would also be relevant to mention that the Appellant Co-Operative Society at its General Meeting held, decided to offer employment opportunities regarding the Nestle project, only to the members of the Society or their relatives. The Applicant had admitted that, at a General Meeting it was announced that members can apply for the vacancies in the Nestle project and accordingly he had applied. The Applicant had also admitted that at the end the second year, a contract for three months was offered to all employees attached to the 'Nestle project.'

(6) According to the evidence led, by 2009 April, the project had become a failure and all persons employed by the project were put on notice that due to financial issues, the project would be terminated.

(7) The Appellant, in explaining the non-payment of the Applicant's salary for the months of May to August, states that they decided to hold it back till the Applicant signed the fresh contract extending his services by 3 months. The Appellant takes up the position that the Applicant's services were not terminated nor was he dismissed from service, but was treated as having vacated his post, since he did not report for duty after the 1st of August 2009.

(8) Having examined and assessed the evidence produced before the tribunal by both parties, the learned President of the Labour Tribunal had focused on the question whether the Appellant had unjustly terminated the services of the Applicant by refusing to employ him on 31st July and 3rd August 2009 or whether the Applicant had vacated his post by not reporting for work from 3rd August 2009. The learned President of the Labour Tribunal observed that the initial recruitment as a Cash Collectors had been on an application made by the Applicant and no evidence had been adduced to establish that a formal contract of employment was initially signed or exchanged to establish a master-servant relationship between the two parties, but the Applicant had continued in service till July 2009, receiving a monthly salary as

remuneration for his work as a Cash Collector. The learned President of the Labour Tribunal, by the award dated 31st May 2011, ordered the Appellant to pay, back-wages to the Applicant at the rate Rs.10, 000/- for the months of May, June and July of 2009, [the three months for which the Applicant complained that he was not paid] and to pay wages amounting to Rs. 240,000 (10,000 x 24) up to the date of the Tribunal's decision, and also to reinstate the Applicant with effect from 3rd May 2011.

(9) From the tenor e of the award of the Labour Tribunal, it appears that the learned President of the Labour tribunal had concluded that the Applicant's employment with the Appellant was on a permanent basis for the reason that the Appellant had neither adduced any material as evidence nor elicited in the cross examination, to establish that the form of employment offered to the Applicant was one of a contractual and not of a permanent nature . [Page 5 of the Award]. This observation in my view, however, does not seem to be accurate and later in the judgement I have given reasons for the said conclusion.

(10) Being aggrieved by the said order, the Appellant appealed to the High Court pleading that the orders referred to in the preceding paragraph were erroneous on two grounds. Firstly, that despite being employed on a contract basis for a fixed period of time, the learned President of the Labour Tribunal had declared the Applicant to be a permanent employee. Secondly, that despite the Applicant's voluntary termination of services by vacating the post, the learned President of the Labour Tribunal had declared that his services had been terminated by the Appellant.

(11) The learned High Court Judge, relying on the decision in the case of *Ceylon Cinema and Film Studio Employees Union v. Liberty Cinema Ltd* 1994 3 SLR 121 held that the assessment of evidence lies within the province of the

Labour Tribunal, and the appellate court cannot review the Labour Tribunal's findings unless the Labour Tribunal had no evidence on record to support its findings. Accordingly, the Appellant was required to satisfy the High Court that there was no cogent evidence to support the conclusion reached by the Tribunal or that the finding was not rationally possible and was perverse having regard to the material placed before the Tribunal. The learned High Court Judge, having observed that the Appellant failed to satisfy Court, upheld the order of the learned President of the Labour Tribunal and by its order dated 21st October 2014, ordered back wages amounting to 42 months beginning in May 2011 up to September 2014 amounting to a sum of Rs. 420,000 (10,000 x 42), in addition to the wages ordered by the Labour Tribunal. The learned High Court Judge also affirmed the order of the Labour Tribunal directing the Appellant to reinstate the Applicant with effect from 30th November 2014.

(12) Before addressing the questions of law on which Special Leave was granted, I wish to touch on the appellate jurisdiction of the High Court and this Court as regards appeals from Labour Tribunals. In the case of ***Kotagala Plantations Ltd and Lankem Tea and Rubber Plantations (Pvt) Ltd v. Ceylon Planters' Society*** **SC Appeal 144/2009 SCM 15.12.2010,** Chief Justice, De. Silva, observed that: "... It is not for an Appellate Court to review the evidence and come to a different conclusion regarding the facts of the case **unless the findings on the facts by the Tribunal was against the weight of the evidence…".** Emphasis is mine]

(13) Therefore, this court does not endeavour to re-assess or re-evaluate any facts unless and otherwise the Appellant has satisfied the court that the learned President of the Labour Tribunal overlooked or reached conclusions which were against the weight of the evidence, or the conclusions reached were rationally impossible or perverse. Therefore, I shall confine my review solely

to the order of the learned President of the Labour Tribunal, which the Appellant submits was bad in law having regard to the weight of specific evidence placed before the Labour Tribunal.

Nature of Employment [1st question of law]

(14) Learned Counsel for the Appellant submitted that the nature of the Appellant's business as a Co-operative 'thrift society' was such that they would, from time-to-time, engage in various ventures with a view to generating revenue for its membership, and the agreement entered into with Nestle Lanka PLC, [in 2007] to distribute their products in the region, was one such venture. The management of the Society had also taken a decision to offer any available employment in connection with the Nestle venture to its own members as it would be some benefit to them. The Applicant being a member of the Society, was therefore one among many who was contracted for the specific purpose of collecting cash from the retailers to whom the merchandise was supplied. Learned Counsel for the Appellant also noted that the nature of the Applicant's employment was such that it was exclusively confined to the specific venture and the Applicant's admissions before the Labour Tribunal indicate that he too was aware of this fact. The learned Counsel for the Appellant drew the attention of the court to the evidence at the inquiry which reveals that the distribution of products in relation to the Nestle venture was phased out from about April 2009. The learned Counsel's submissions on this matter concluded by noting how the Applicant was provided employment for two subsequent years, each for a fixed term, during which the Appellant was engaged in the venture with Nestle Lanka PLC, and therefore, the Applicant's employment could not have been that of a permanent employee and could only be one of a fixed term employee. It is the Appellant's submission that therefore both the learned President of the Labour Tribunal as well as the learned High Court Judge misdirected themselves in holding that the Applicant was not a fixed term employee. It is the Applicant's position, that he

was a permanent employee, that he not working on a contract of employment for a fixed period of time, nor had he entered into any such contract.

(15) As **S. R. de Silva** notes in **'The Contract of Employment' (1998)** para. 179, p. 138, 'permanent employee' refers to persons who serve under a monthly contract or agreement of employment whereby the agreement upon which the master-servant relationship operates is renewed at the end of each month unless it is terminated upon notice by either party.

(16) At the inquiry before the Labour Tribunal, it was revealed that at the stage of recruitment, although the Appellant had decided to employ Cash Collectors on a contract basis for a fixed period, no written contract for the year 2007 - 2008 had been executed. R16 is the written contact drawn in the name of the Applicant signed by the Chairman of the Appellant Co-operative Society for the period 2008 August to 2009, however, its acceptance had not been acknowledged by the Applicant. The Applicant nevertheless had admitted at the inquiry (referenced in pages 13, 28, 29, 31 and 42 in the brief marked 'X') that despite the absence of a written contract of employment for a fixed term, he was aware of the nature of his employment as being exclusively confined to the Nestle venture. When questioned as to whether the Applicant was aware that he was employed to work for a period of one year, the Applicant answered that he had not been provided with notice of such an arrangement. Furthermore, it is the Appellant's submission that the learned President of the Labour Tribunal had not adduced sufficient weight to the documentary evidence (R16) provided to the Tribunal indicating the existence of a fixed-term contract between the Appellant and the Respondent.

(17) As noted by the learned President of the Labour Tribunal, both R16 documents, which appear to be the Applicant's letter of appointment and contract of employment for the period 1st August 2008 to 31st July 2009 do

not bear the signature of the Applicant and the Appellant does appears to have not acted in a professional manner when it came to regularising employment. Both, witnesses Somalatha [Accountant] and Withanachchi [Store keeper] of the Co-operative Society had been emphatic that the nature of the employment that was offered to all the employees relating to the Nestle venture were of fixed time contracts. It was the evidence of witness Withanachchi, that they [all those were recruited] were informed that, as the Society would only be acting as agents for Nestle, they were not being recruited on a permanent but only on a contract basis.

(18) When one considers the totality of the evidence led, the explanation of the learned Counsel for the Appellant as to why the Appellant decided to employ persons, whose services were confined to the Nestle venture, on a Fixed Term Contract seems rational. Thus, the learned President of the Labour Tribunal fell into error when he held that *" the Respondent [present Appellant] had not placed any evidence either through the cross examination of the Applicant or by other evidence that the Applicant entered into an employment contract with the Appellant on an yearly basis"* Accordingly, I answer the first question of law in the affirmative and hold that the nature of employment offered to the applicant was one of a fixed term contract.

Termination of Services

(19) It is established that neither the Appellant nor the Respondent provided notice of termination of services. Any cessation of service, therefore must necessarily have been caused by vacation of post by the Applicant or constructive termination of the Applicant's employment by the Appellant.

(20) It would be pertinent to examine the distinct elements of vacation of post as a means by which an employment is terminated. In a series of cases decided by this court, it has been established that vacation of post refers to a situation in

which the employee terminates his employment by not reporting to work over a sustained period of time, with no *animus revertendi*. I wish to examine the principles enunciated in the cases of ***Building Materials Corporation*** **v.** ***Jathika Sevaka Sangamaya*** **(1993) 2 Sri LR 316** and ***Nelson De Silva*** **v.** ***Sri Lanka State Engineering Corporation*** **(1996) 2 Sri LR 342.**

(21) In ***Building Materials Corporation*** **v.** ***Jathika Sevaka Sangamaya,*** Justice Perera observed that vacation of post occurs as follows: "Where **an employee endeavours to keep away from work or refuses or fails to report to work or duty without an acceptable excuse for a reasonably long period of time** such conduct would necessarily be a ground which justifies the employer to consider the employee as having vacated service." [At p. 322] (emphasis added). In ***Nelson De Silva*** **v.** ***Sri Lanka State Engineering Corporation*** Justice Jayasuriya held that "[the] concept of vacation of post **involves two aspects**; one is **the mental element**, that is **intention to desert and abandon the employment** and the more familiar element of the concept of vacation of post, which is the **failure to report at the workplace of the employee. To constitute the first element, it must be established that the Applicant is not reporting at the workplace, was actuated by an intention to voluntarily vacate his employment.**" [at p. 343] (emphasis added).

(22) It is therefore evident that to constitute vacation of post, the workman must not report to or seek work from the employer. It is in evidence that the Applicant sought work from the Appellant on 31st July and 3rd August 2009. It is also established that the Applicant worked for the Appellant for the months of May, June and July without receiving his salary. The Applicant's position is that he inquired about the salary, but the Appellant refused to offer work to the Applicant, informing him that he would not be provided with work nor be paid the salary for the months of May, June and July until he signed the contract extending his services by 3 months from August 2009.

From the evidence it is clear that there was a standoff between the two parties, the Applicant was not agreeable to the extension of the [employment] contract only for three months, whereas the Appellant was not in a position to offer a contract for a longer period due to the Nestle project coming to an end. The Applicant's repeated attempts to report for work, prior to his absence from work due to the Appellant's manifest refusal to pay his salary leads me to draw the conclusion that the Applicant had not vacated his post.

(23) I wish to now examine whether the Applicant's services were terminated by the Appellant. I find the observations of Gunasekara, J. in the case of ***Pfizer Limited*** **v.** ***Rasanayagam*** **(1991) 1 Sri LR 290** before the Court of Appeal *ad rem* in this aspect. The Applicant, in that case, had communicated that although he did not report for work, he was willing to work for the employer and that his absence was a form of protest against the employer's order to report to a colleague who was a junior officer. Gunasekara, J. stated that "The question as to whether a given set of circumstances constitutes a vacation of employment or a constructive termination is a question of fact to be determined by the Tribunal having regard to all the facts and circumstances which transpire in the evidence." [at p. 294].

(24) The case of ***Warnakulasooriya v. Hotel Developers (Lanka) Ltd*****, SC Appeal 101/2014 (Decided on 26-07-2018)** is helpful in making the aforementioned determination. The employee in that case had been served with a letter terminating her services for vacating her post due to prolonged and sustained absence from employment. It was revealed that the employee had been unable to report to work due to medical reasons and had reported for work at the earliest possible date and submitted a medical certificate confirming the reasons for her absence. This Court, exercising its appellate jurisdiction held that the mental element of abandonment of employment had not been established as the employee had returned to work on the earliest

possible day, and for that reason the learned President of the Labour Tribunal and the learned High Court Judge had erred in concluding that the employee had vacated her post. The Court arrived at the said decision having considered the weight of documentary evidence placed before the Tribunal which indicated that the employer had send multiple notices and letters requiring explanation from hr for her absence.

(25) In the present case, as observed by the learned President of the Labour Tribunal, not only did the Appellant fail to provide such notice to the Applicant, but the Appellant had on two occasions expressly denied him work after he had served without receiving a salary for three consecutive months. The Appellant has submitted to the Labour Tribunal that it sought to discuss the Applicant's employment after 3rd August 2009 by inviting the Applicant to attend a discussion by a letter dated 24th August 2009. As observed by the learned President of the Labour Tribunal, however, there is no proof that such a letter was communicated to the Applicant

(26) It is my view, therefore, that by not providing the Applicant his salary for three consecutive months, and thereafter refusing to employ him, the Appellant had unjustly terminated his employment on the 3rd August 2009.

Order of Reinstatement [2nd question of law]

(27) It is the Appellant's submission that the President of the Labour Tribunal and the learned High Court Judge misdirected themselves by ordering reinstatement of service of the Applicant whereas the venture in question had ceased to function. The Applicant maintained that the reinstatement of his service was just and equitable. The Appellant in its written submission before this court referred to the decisions in De *Silva v. Ceylon Estate Staff's Union,* SC 211/72 SCM 15.05.1974 and *United Industrial Local Government and General Workers' Union v. Independent News Papers Ltd* 75 NLR 531 to

convince the court that the learned President of the Labour Tribunal erred in ordering reinstatement of the Respondent when the Appellant Co-op Society had been compelled to terminate its venture with Nestle PLC due to its failure.

(28) In the case of, ***United Industrial Local Government and General Workers' Union v. Independent News Papers Ltd.*** [supra], It was held [at p. 531] that the finding of a workman's termination of service as being unjust does not entitle the workman to demand reinstatement as a right, nor does it confer upon the Labour Tribunal an obligation to order reinstatement, the tribunal is vested with the discretion to determine whether payment of compensation would be a just alternative to reinstatement. I also wish to note the observations of Rajaratnam, J. in ***De Silva v. Ceylon Estate Staff's Union*** SC 211/72 SCM 15.05.1974: "…***the Tribunal must be mindful of the nature of the applicant's employment,*** the impact a reinstatement can make on the industry and the employer/ employee relationship. It should also consider whether an order of reinstatement would disrupt and disorganize the management or administration of the business.". [Emphasis added]. Furthermore, it was observed by this court in the case of **Jayasuriya vs. Sri Lanka State Plantation Corporation** 1995 2 SLR 379, that even where the dismissal is unlawful, reinstatement will not invariably be ordered either where it is inexpedient or where there are unusual features. In such an event, an award of compensation instead of reinstatement would meet the ends of justice. The instant case, in my view, is not an instance where reinstatement of the Applicant is expedient given the nature of the employment the Applicant was engaged in.

(29) It is established that the Appellant's business venture with Nestle Lanka PLC had completely ceased by 2010. Due to the unique utility 'Cash Collectors' offered to the Appellant in its venture with Nestle Lanka PLC, the fact that the venture had ceased due to its financial failure as far as the Appellant was

concerned and in particular the nature of employment that was offered to the Applicant, it is my considered view that the learned President of the Labour Tribunal erred in ordering reinstatement of the Applicant's services with effect from 3rd May 2011, and the learned High Court Judge erred in ordering reinstatement of service with effect from 30th November 2014.

(30) Accordingly, I answer the 2nd question of law also in the affirmative.

Payment of Back Wages

(31) It is the Appellant's submission that in the event this court finds that the Respondent's employment was terminated unjustly, the duration for the computation of payment of back wages should not extend beyond the period of employment the Respondent would have enjoyed, had his employment not been terminated. I am mindful of the duty of a Labour Tribunal, and consequently this court, to make such award or order as may appear just and equitable. The Applicant, no doubt, is entitled to compensation for the sudden termination, as he would have had a reasonable expectation of continuing employment within the venture. When computing compensation on the basis of the Applicant's basic salary, the final date of his period of service should be reconciled with the final date of employment of other persons employed as Cash Collectors for the Appellant's venture with Nestle Lanka PLC. Having considered all the facts and circumstances of the case, it is my view that that the compensation ordered by the learned President of the Labour Tribunal is reasonable and cannot be considered as excessive

(32) Accordingly, the order of the learned President of the Labour Tribunal dated 31st May 2011 ordering back wages amounting to Rs. 240,000 is affirmed. In my view the order of learned High Court Judge enhancing the back wages to Rs. 420,000 cannot be justified as the High Court had arrived at the said figure without proper evaluation of the facts relevant to issue of back wages.

(33) In determining this matter the principle laid down in the case of **Jayasuriya**

vs. Sri Lanka State Plantation Corporation [supra] would be relevant. It was held that "*In determining compensation what is expected is that after weighing together of the evidence and probabilities in the case, the Tribunal must form an opinion of the nature and extent of the loss, arriving at an amount that a sensible person would not regard as means of extravagant but would rather consider to be just an equitable in all the circumstances of the case'.* The Court also observed [in the case of **Jayasuriya**] "*that the burden is on the employee to adduce sufficient evidence to enable the tribunal to assess the loss and ….if the employee had had obtained equally beneficial or financially better alternative employment, he should receive no compensation.*" In the instant case the Applicant had failed to adduce any evidence as to loss to him.

(34) Accordingly, the order made by the learned High Court Judge enhancing the compensation ordered by the President of the Labour Tribunal is set aside and the order of the Labour Tribunal regarding compensation is affirmed. It is in evidence that the Applicant was not paid by the Appellant for the months of June, July and August 2009. That had not been factored in by the Labour Tribunal when computing the compensation. As such the Appellant is directed to pay the Applicant a sum of Rs.30,000/- in addition to Rs.240,000/- ordered by the Labour Tribunal.

Considering the above the 3rd question of law, which has two parts, is answered in the following manner;

(a) The Labour Tribunal had not erred in fact and law in computing the back wages of the Applicant and that part of the question is answered in the negative

(b) The High Court had erred in fact and law in computing the back wages of the Applicant and that part of the question is answered in the affirmative.

The Court makes the following orders;

(1) The orders made by both the Labour Tribunal and the High Court to reinstate the Applicant [Respondent] are set aside.

(2) The Applicant would be entitled to compensation in a sum Rs 270,000/-and the Appellant is directed to make this payment within two months from today.

(3) The Applicant [Respondent] is also entitled for the cost of this case in a sum of Rs. 40,000/-

Appeal is partially allowed

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE YASANTHA KODAGODA PC.

I agree

JUDGE OF THE SUPREME COURT